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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 223

RAILWAY EXPRESS AGENCY, INCORPORATED,
Petitioner,

vs.

WILLIAM J. KENNEDY, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

KENNETH F. BURGESS,
DOUGLAS F. SMITH,
HOWARD P. ROBINSON,
JOHN R. TAYLOR,
Counsel for Petitioner.

SIDLEY, AUSTIN, BURGESS & SMITH,
11 S. La Salle Street,
Chicago 3, Illinois,
Of Counsel.

THE GUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Railway Express Agency, Incorporated, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled case on June 5, 1951.

OPINIONS BELOW.

The memorandum order of the District Court (R. 41) is unreported. The opinion of the Court of Appeals (R. 62-67) is not yet officially reported.

"registration period." Certain disqualifying conditions are provided by the Act, one of which, pertinent here, makes an employee ineligible for unemployment compensation if

> "* * * the Board finds that his unemployment was due to a stoppage of work because of a strike in the establishment * * * at which he was last employed, and the Board finds that such strike was commenced in violation of the provisions of [the Railway Labor Act] * * *." 45 U. S. C. § 354(a-2)(iii).

Despite this provision of the Act, the Railroad Retirement Board authorized the payment of unemployment benefits to employees of petitioner during a strike commenced under the following circumstances:

On June 1, 1950, petitioner received a letter from officers of Locals 808 and 459 of the International Brotherhood of Teamsters, which represent certain of petitioner's employees in the New York metropolitan area, requesting changes in hours of work, rates of pay and working conditions of those employees. (R. 12.) Thereafter, pursuant to the procedure set out in section 2, Second, of the Railway Labor Act, petitioner entered into negotiations with the representatives of these employees for the purpose of negotiating a new labor agreement. During the course of negotiations, however, a dispute arose which was not adjusted by the parties. (R. 27.) Accordingly, on September 21, 1950, acting pursuant to section 5, First of the Railway Labor Act, petitioner invoked the services of the National Mediation Board. (R. 31.)

Although the Mediation Board immediately wired officers of Locals 808 and 459 that its services had been invoked and that mediation would be assigned as quickly as possible (R. 32), the employees represented by these Locals rejected the services of the Board by commencing a strike against petitioner on September 23, 1950. (R. 29.)

Notwithstanding the fact that on October 3, 1950, the President appointed an Emergency Board under section 10 of the Railway Labor Act to investigate and report concerning the dispute (R. 33), the strike continued until October 12, 1950. (R. 29.)

With respect to the first 14 day period of the strike the Railroad Retirement Board authorized and paid unemployment benefits amounting to more than $90,000 to the employees here involved despite the provisions of 45 U. S. C. § 354(a-2)(iii) quoted above and even though they had been apprised of the fact that the employees had refused to comply with the procedures set out in the Railway Labor Act. (R. 37.) Upon receiving information of these payments, petitioner protested to the Board against the allowance of any further unemployment benefits to the striking employees and demanded in writing the right to be heard by the Board on the question whether the employees were disqualified from receiving compensation under the Railroad Unemployment Insurance Act. (R. 13-14.) On October 19, 1950, the Board denied petitioner's protest and demand on the ground that petitioner was not a "party properly interested." (R. 15-16.)

Having been informed by the Board that it intended to make further payments to petitioner's employees for the second registration period, petitioner brought suit in the United States District Court under 28 U. S. C. secs. 1337 and 1332, praying for an injunction restraining respondents from directing or authorizing such payments, which would have amounted to $38,103.75. (R. 37.)

On October 23, 1950, the District Court granted petitioner's motion for the issuance of a temporary restraining order. (R. 19.) Thereafter, the general counsel of the Railroad Retirement Board filed a motion on behalf of two of the three members of the Board to dismiss the complaint. (R. 34.) The District Court, after hearing, granted the gen-

eral counsel's motion. (R. 41.) The Court of Appeals for the Seventh Circuit affirmed on the grounds (1) that petitioner has no standing to challenge the action of the Railroad Retirement Board, and (2) that the Railroad Unemployment Insurance Act precludes judicial review of an award of unemployment benefits at the instance of an employer. An injunction pending appeal, entered by the District Court on the date it dismissed the complaint, is still in effect. (R. 44.)

SPECIFICATION OF ERRORS TO BE URGED.

The Court of Appeals erred:

1. In failing and refusing to hold that respondents violated their statutory duty in authorizing the payment of unemployment compensation from the Railroad Unemployment Insurance Account to employees who struck in violation of the provisions of the Railway Labor Act.

2. In holding that petitioner has no standing to sue to restrain the Railroad Retirement Board from making payments out of the Railroad Unemployment Insurance Account to employees who strike in violation of the Railway Labor Act.

3. In holding that the Railroad Unemployment Insurance Act precludes any judicial review of orders of the Railroad Retirement Board authorizing the payment of unemployment compensation to employees who strike in violation of the Railway Labor Act.

4. In affirming the judgment of the District Court.

REASONS FOR GRANTING THE WRIT.

1. Section 4(a-2)(iii) of the Railroad Unemployment Insurance Act, 45 U. S. C. § 354(a-2)(iii), which prohibits the payment of unemployment compensation to em-

ployees who strike in violation of the Railway Labor Act, was designed to encourage adherence by employees to the procedures established by that Act for the peaceful settlement of disputes and to insure that funds paid into the Unemployment Insurance Account by carriers pursuant to statute would not be used to finance unlawful strikes. The Railway Labor Act outlines four steps for the settlement of labor controversies between carriers and their employees: (1) there must be good faith negotiation by the carrier and representatives of its employees (sec. 2, Second); (2) in the event that a dispute is not adjusted by the parties in conference, either party may invoke the services of the Mediation Board, which shall use its best efforts to bring them to agreement (sec. 5, First); (3) if mediation is unsuccessful, the Mediation Board shall endeavor to induce the parties to submit to arbitration (sec. 5, First); and (4) if arbitration is refused, and the Mediation Board believes that the dispute threatens substantially to interrupt interstate commerce so that any section of the country will be deprived of essential transportation service, it must report that fact to the President, who may thereupon create an Emergency Board to investigate and report concerning the dispute (sec. 10). That section further provides:

> "After the creation of such board and for thirty days after such board has made its report to the President, no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose."

The complaint alleges, and it is not denied, that petitioner's employees struck after participating in only the first of four steps contemplated by the Railway Labor Act and only two days after the unions had been notified that petitioner had commenced the second step by invoking the services of the Mediation Board. Nevertheless, the

Railroad Retirement Board takes the position that petitioners did not strike in violation of the Act. The Board's theory is that the first three steps provided by the Railway Labor Act are directory only, so far as employees are concerned, and that the Act imposes no obligation upon the employees to refrain from striking except at the fourth step—*i. e.*, during the period after creation of an emergency board and for thirty days after such board has made its report to the President. (sec 10.)

The Board thus takes the position that employees of carriers are in no way inhibited from striking in flat disregard of the important statutory procedures set out in the Railway Labor Act for the peaceful settlement of labor disputes. Even under the Board's theory, however, the strike became illegal when continued for nine days after creation of an Emergency Board on October 3, 1950. It defends its decision to pay benefits during this period, nevertheless, on the ground that, while the continuation of the strike after October 3 was a violation of the Railway Labor Act, the strike was not "*commenced* in violation of" that Act so as to come within the prohibition of 45 U. S. C. § 354(a-2)(iii). The Board's tortured interpretation of these statutes is contrary to the decisions of this Court, to the decision of the Emergency Board appointed in this case, and to the specific provisions of the Railway Labor Act, and has produced a division of opinion within the Board itself.

(a) The Board has acknowledged that its decision is irreconcilable with this Court's statement of the duties imposed upon both parties by the Railway Labor Act. In *Elgin J. & E. R. Co.* v. *Burley,* 325 U. S. 711, 725 (1945), this Court said:

> "Beyond the initial stages of negotiation and conference, however, the procedures diverge. 'Major disputes' go first to mediation under the auspices of the

> National Mediation Board; if that fails, then to acceptance or rejection of arbitration, cf. § 7; *Trainmen* v. *Toledo, P. & W. R. Co.*, 321 U. S. 50; and finally to possible presidential intervention to secure adjustment. § 10. For their settlement the statutory scheme retains throughout the traditional voluntary processes of negotiation, mediation, voluntary arbitration, and conciliation. Every facility for bringing about agreement is provided and pressures for mobilizing public opinion are applied. *The parties are required to submit to the successive procedures designed to induce agreement.* § 5 First (b). *But compulsions go only to insure that these procedures are exhausted before resort can be had to self-help.* No authority is empowered to decide the dispute and no such power is intended, unless the parties themselves agree to arbitration." (Emphasis supplied.)

In its brief in the Court of Appeals the Board defended its position that the parties are *not* required "to submit to the successive procedures designed to induce agreement" on the ground that this Court's statement, quoted above, "was purely *obiter dictum*," which was made "without the deep and careful consideration which the Court would otherwise give to a point necessary to its decision." Whether or not this Court's statement was dictum, and whether or not an administrative agency should follow this Court's interpretation of a statute even if dictum, as do the federal courts, see *e. g. Riverside Cement Co.* v. *Rogan*, 59 F. Supp. 401, 404 (D. C. Cal., 1945), the Board's decision indicates a decisive conflict of opinion in respect of the proper interpretation of an important federal statute which should be resolved by this Court. Proper judicial administration would require this Court to review a decision of an inferior federal court expressly refusing to interpret a federal statute consistently with the interpretation given that statute by this Court. *A fortiori* the decision of an administrative body flatly contradicting the interpretation

given a federal statute by this Court should not go unreviewed except for compelling reasons. That there are no such reasons in this case will be demonstrated *infra*, pp. 12-23.[2]

(b) The Board's interpretation of the Railway Labor Act is contrary to that of the Emergency Board appointed by the President to investigate the facts of this very dispute. In its report to the President, of which this Court may take judicial notice, *Jackson* v. *United States*, 230 U. S. 1, 18 (1913), the Emergency Board stated at p. 10:

> "Under normal circumstances the Board would have recommended the increase be made retroactive to September 1, 1950, when other New York truck drivers got theirs. In view of the work stoppage, however, *which the Board believes was outside the spirit, if not the letter, of the Railway Labor Act*, we recommend that the increase be made retroactive to October 13, 1950, the day the strike ended." (Emphasis supplied.)

Thus, at the same time that one agency of the United States was calling attention to the failure of petitioner's employees to comply with the procedures of the Railway Labor Act, another agency was authorizing the payment of unemployment compensation to the strikers on the theory that they had no duty to comply with those procedures. This important conflict of opinion between the Railroad Retirement Board and the Emergency Board as to the proper interpretation of the Railway Labor Act presents an addi-

[2] The Board's interpretation of the Railway Labor Act is also wholly inconsistent with this Court's decision in *Virginian Ry. Co.* v. *System Federation No. 40*, 300 U. S. 515 (1937). There, the duty to negotiate in good faith for the settlement of disputes was specifically enjoined upon carriers, and this Court has held that the reasoning of that opinion applies equally to employees. *Elgin, J. & E. R. Co.* v. *Burley*, 325 U. S. 711, 721 (1945). Respondents' view of the Act would require them to pay unemployment compensation during a strike called in flat violation of this duty to negotiate, which is the first step in the procedures established by the Act.

tional reason for the issuance by this Court of its writ of certiorari.[3]

(c) Finally, the interpretation adopted by a majority of the Railroad Retirement Board wholly disregards the purpose and intent of Congress in enacting the Railway Labor Act and the express statutory provisions of that Act. The Act clearly contemplates that before resorting to economic force the parties to a railway labor dispute must meet together to negotiate concerning the dispute, must accept the services of the National Mediation Board as mediator, must consider that Board's proposal of arbitration, and must maintain the status quo for thirty days after the report to the President of an Emergency Board. This procedure is obviously frustrated if employees are free to strike at any of the intermediate stages; yet that, in sum and substance, is the position taken by the Railroad Retirement Board.

The Board's ruling gives no effect whatever to the command of section 2, First of the Act that

> "It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carriers growing out of the dispute between the carrier and the employees thereof."

[3] It should be noted, furthermore, that a controversy exists within the Railroad Retirement Board itself as to the propriety of the payments in this case. Although all members of the Board were served with summons and complaint, the general counsel has on all occasions appeared for only two members. Respondent Frank C. Squire has never authorized the general counsel to represent him in opposing petitioner's prayer for an injunction against the payment of compensation to the employees here involved and, upon the record, does not object to the entry of such an injunction. (R. 35.)

If participation in the procedures established by the Act is a "reasonable effort" to settle the dispute, therefore, the Act imposes the duty upon both parties to participate. *Cf. Trainmen* v. *Toledo, P. & W. R. Co.*, 321 U. S. 50 (1944). The Railroad Retirement Board's decision in effect determines that there is no such duty.

The question of the extent of the obligation imposed upon employees by the Railway Labor Act is an important and recurring one.[4] The decision of the Railroad Retirement Board is flatly contrary to the express language and purpose of the Act and to the decisions of this Court and of the Emergency Board created in this case and is contrary to the announced position of the National Mediation Board.[5] The public interest in a proper and uniform application of an important federal statute requires this Court's consideration of the first question presented by this petition.

2. The Court of Appeals avoided decision of the propriety of the Railroad Retirement Board's ruling by holding that petitioner has no standing to sue to enjoin the unlawful payment by the Railroad Retirement Board of unemployment benefits. The court's theory was that the contributions which petitioner is required to pay into the Railroad Unemployment Insurance Account are a type of tax, and that a taxpayer has no standing to sue to prevent the unauthorized expenditure of federal funds under the doctrine of *Frothingham* v. *Mellon*, 262 U. S. 447 (1923). This holding not only represents a vast extension of the

[4] On June 19, 1951, the Secretary of the National Mediation Board notified the president of the Air Line Pilots' Association that the strike of United Air Line Pilots, which was called while the Board was mediating their dispute with the company, was illegal and that mediation services would be withdrawn until the strike was ended. The president of the union, on the other hand, contended that the strike was legal. See *New York Times* for June 20, 1951, p. 1.

[5] See footnote 4.

Frothingham rule but in fact is wholly inconsistent with that and other decisions of this Court.

In *Frothingham* v. *Mellon, supra,* a single taxpayer sought to enjoin the appropriation of moneys by Congress under the Maternity Act, 42 Stat. 224, on the ground that the Act was unconstitutional and that the making of such unlawful appropriations would increase her future tax burdens, thereby taking her property without due process of law. This Court held that she had no standing to sue for two reasons. First, the taxpayer's interest in the moneys of the federal treasury is a minute interest shared with millions of others; the effect upon future taxation of any payment out of the fund is so remote and undeterminable that "no basis is afforded for an appeal to the preventive powers of a court of equity." To be distinguished, said this Court, is the interest of a taxpayer of a municipality in the application of its moneys, which is sufficiently direct and immediate to justify resort to the injunctive powers of the courts to prevent misuse of the funds, citing *Crampton* v. *Zabriskie,* 101 U. S. 601, 609 (1879). 262 U. S. at 486, 487. Second, the Court has no power to review or annul acts of Congress except when a question under the act is presented to it by a claimant who has a special, individualized stake in it. That is,

> "The party who invokes the power [of the court] must be able to show not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining some direct injury as a result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally." 262 U. S. at 488.

Even if it is assumed that the "contributions" which carriers must make to the Railroad Unemployment Insurance Account under 45 U. S. C. § 358 are, in fact, taxes, it requires no more than a cursory examination of that stat-

ute to disclose that the effect of unlawful expenditures from the Account upon the unemployment compensation taxes of petitioner and other carriers is very different from the remote and minuscule effect of appropriations from the general funds of the federal government upon an individual's income taxes. The contributions which carriers must make under the Railroad Unemployment Insurance Act do not become part of the general funds of the Treasury; they are collected by the Board and deposited by it with the Secretary of the Treasury. 45 U. S. C. § 358(f). The Secretary maintains these moneys as a trust fund, and all such moneys are permanently available to the Board without further appropriation for the payment of unemployment and sickness benefits and may not be used for any other purpose. 45 U. S. C. § 360. And most important, the rate of taxation of petitioner and the other carriers subject to the Act is directly and arithmetically related to the amount in the trust fund. 45 U. S. C. § 358(a). See footnote 1, *supra*.

To say that petitioner and the other carriers have no more interest in the integrity of the trust fund than that held "in common with people generally" is to blind one's self to the undisputed facts. Indeed, the *only* persons adversely affected by the unlawful payments already made and about to be made by the Board are petitioner and a few hundred other carriers who must make up, by their contributions, the amounts unlawfully expended. While the balance in the Account amounted to over $700 million on September 30, 1950, so that the carriers are currently paying at the minimum rate of 0.5 per cent (R. 38), that balance is steadily decreasing. In the last two years, in fact, the balance in the account has dropped almost $200 million. Compare 13 Fed. Reg. 8282 with 15 Fed. Reg. 7903. While it cannot be said with exact certainty when and how much the

unlawful payment of unemployment benefits will affect the contribution rates which petitioner must pay, it can be said with complete accuracy that a definitely ascertained group—petitioner and the other carriers whom it represents—not "people generally," must pay for these unlawful benefit allowances and that they have a definite, concrete interest in preserving the fund from improper depletions. Certainly the interest here represented by petitioner is much greater and more precisely defined than that of a municipal taxpayer who seeks to enjoin municipal expenditures. *Crampton* v. *Zabriskie, supra,* approved in *Frothingham* v. *Mellon, supra* at p. 486 and in *Coleman* v. *Miller,* 307 U. S. 433, 445 (1939). Certainly, too, the interest of petitioner and the other carriers is much more an individual interest than that represented by the plaintiffs in the case last cited,[6] and is akin to that of the milk producers in *Stark* v. *Wickard,* 321 U. S. 288, 304-5 (1944).

In this case the Court of Appeals went no farther, before invoking the *Frothingham* doctrine, than to determine that the contributions made by petitioner and the other carriers to the Railroad Unemployment Insurance Account "constitute a type of tax." (R. 65.) It clearly stated an immutable principle that no federal taxpayer has standing to challenge the expenditure of federal funds, whatever the incidence of the tax and whatever the consequences to the taxpayer of the challenged expenditure. This holding, which cannot be supported by the rationale of the *Frothingham* case and is contrary to *Crampton* v. *Zabriskie, supra, Coleman* v. *Miller, supra, Stark* v. *Wickard, supra, Franklin Township* v. *Tugwell,* 85 F. 2d 208 (C. A. D. C., 1936), and *Buscaglia* v. *District Court of San*

[6] The plaintiffs in the *Coleman* case were members of the Kansas legislature who sought to restrain the formal acts of ratification by state officials of the Child Labor Amendment.

Juan, 145 F. 2d 274 (C. C. A. 1, 1945) among others, clearly raises important issues requiring the further consideration of this Court.

While state court rulings upon the adequacy of legal interest are not binding upon this Court, *Tyler* v. *Judges,* 179 U. S. 405 (1900), it is pertinent to point out that the state courts have uniformally recognized the interest of an employer in the legality of payment of unemployment benefits to his employees as sufficient to give him standing to sue. *Chrysler Corp.* v. *Smith,* 297 Mich. 438, 298 N. W. 87 (1941), *Carnegie-Illinois Steel Corp.* v. *Review Board,* 117 Ind. App. 379, 72 N. E. 2d 662 (1947); *Crossett Lumber Co.* v. *McCain,* 205 Ark. 631, 170 S. W. 2d 64 (1943); *Industrial Comm.* v. *Evans,* 52 Utah 394, 174 Pac. 825 (1918).

The court below sought to avoid the effect of these decisions by reliance upon this Court's decision in *Gange Lumber Co.* v. *Rowley,* 326 U. S. 295 (1945). In that case an employer claimed that it was denied due process of law by a state statute extending the period in which a workman might file claim for readjustment of workmen's compensation on account of aggravation of injury from three to five years. This Court held that the employer had failed to make a sufficient showing of interest to entitle it to question the *constitutionality* of the statute. This Court was not called upon, nor did it, consider the question whether an employer whose future contributions depend upon the balance in a fund has sufficient interest to challenge unlawful administrative action under the statute. As the Court's opinion is careful to point out throughout, the sole issue decided in that case was whether the employer had shown sufficient injury to justify a holding that the state statute had deprived him of his property without due process of law. The Court's answer was that it had not:

"*The Fourteenth Amendment,* through the due proc-

ess clause, does not assure protection from the state's regulatory powers against injuries so remote, contingent and speculative. Some substantial and more immediate harm must be shown to present a justiciable question *concerning the state's power.*" 326 U. S. at 305. (Emphasis supplied.)[7]

Had the Court decided the broad question of the sufficiency of the employer's interest to challenge unlawful administrative application of the statute, as the court below assumed, it would necessarily have disapproved all of the decisions cited on p. 16, *supra,* and a host of similar cases. That it did not do so is further and conclusively indicated by the fact that the Court laid considerable stress upon the employer's right under the state statute to receive notice of the claim, to participate fully in proceedings before the state administrative agency, and to obtain judicial review of the agency's decision, noting that "No complaint is made that appellant did not have full benefit of the Act's procedural protections." 326 U. S. at 302, note 10. If these "procedural protections" are important it is only because the employer has a real and individual interest affected by the agency's decision. The *Gange Lumber Co.* case thus not only recognizes the sufficiency of the employer's interest to attack agency action unlawfully depleting a fund to which he must contribute but emphasizes the need for procedural safeguards against such arbitrary action by administrative officials. The decision of the court below denying petitioner any such procedural protection in apparent reliance upon the *Gange Lumber Co.* case is not only an unwarranted extension of, but is contrary to, this Court's decision.

[7] In an article entitled "Standing to Challenge and to Enforce Administrative Action," 49 Col. L. Rev. 759, 788 (1949), Professor Davis reads the *Gange Lumber Co.* case as applying only to sufficiency of interest to challenge the *constitutionality* of a statute—the position taken by petitioner and rejected by the Court of Appeals.

3. Alternatively, the Court of Appeals held that, since the Railroad Unemployment Insurance Act provides for administrative and judicial review only at the instance of *employees* who challenge the denial of unemployment compensation, it must be read as precluding judicial review by *employers* of awards of such benefits. That holding, it is plain, confuses two separate and distinct principles often enunciated by this Court. It is one thing to find that Congress did not, in a particular statute, provide for judicial review of agency action taken thereunder. *Cf. Stark* v. *Wickard,* 321 U. S. 288 (1944). It is quite another to find that Congress intended that such action should not be subject to judicial review. *Cf. Switchmen's Union* v. *National Mediation Board,* 320 U. S. 297 (1943). The court below apparently failed to comprehend the significance of that distinction. In contrast and in conflict, see *Air Line Dispatchers Association* v. *National Mediation Board* (C. A. D. C.), decided May 17, 1951. C. C. H. Labor Law Serv., ¶ 66, 340.

The parties are agreed that the Railroad Unemployment Insurance Act makes no specific provision for either administrative or judicial review at the instance of employers of decisions awarding unemployment benefits. It seems equally clear, however, that there is nothing in that Act which demonstrates that Congress intended to preclude judicial review of Railroad Retirement Board decisions flatly contrary to statutory directives. The statute sets out at 45 U. S. C., § 355(c) the review procedures to be followed by *employees* when their claims are denied, and subsection (f) provides for judicial review of final Board action in such cases. Respondents rely upon a portion of subsection (c) as support for their contention that employers are thereby precluded from seeking any judicial review:

"* * * Subject only to such review [the judicial re-

view provided for in subsection (f)], the decision of the Board upon all issues determined in such decision shall be final and conclusive for all purposes and shall conclusively establish all rights and obligations, arising under this chapter, of every party notified as hereinabove provided of his right to participate in the proceedings.

"Any issue determinable pursuant to this subsection and subsection (f) of this section shall not be determined in any manner other than pursuant to this subsection and subsection (f) of this section."

This provision is inapplicable by its very terms. Petitioner, it is conceded, was not a party notified "of his right to participate in the proceedings;" that right was specifically denied it. (R. 15-16.) Nor may the issue of the correctness of the Board's interpretation of the Railway Labor Act be determined "pursuant to this subsection and subsection (f) of this section" in this instance, since subsection (c) makes provision for administrative and judicial review only at the instance of employees denied benefits, not employers. Respondents thus have attempted to read into statutory language which does no more than chart the course that *employees* must follow in seeking review of adverse rulings a Congressional intent that *employers* shall have no means of checking the illegal and unwarranted payments by the Board from a fund which, by law, they are compelled to replenish. That language will not support such a construction.[8]

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[8] Respondents also rely upon similar language in 45 U. S. C., § 355(g), that:

"Findings of fact and conclusions of law in the determination of any claim for benefits or refund, *the determination of any other matter pursuant to subsection (c) of this section,* * * * shall be, except as provided in subsection (f) of this section, binding and conclusive for all purposes and upon all persons, * * * and shall not be subject to review in any

The situation thus presented is very much like that before the Court in *Stark* v. *Wickard, supra.* Here, as there, "there is no direct judicial review granted by this statute for these proceedings." 321 U. S. at 307-8. Similarly, "the Act bears on its face the intent to submit many questions arising under its administration to judicial review." *Id.* at 308. There, as here, "It is because every dollar of deduction comes from the [employer] that he may challenge the use of the fund." *Ibid.* In considering whether the statute there involved precluded judicial review this Court said:

> "With this recognition by Congress of the applicability of judicial review in this field, it is not to be lightly assumed that the silence of the statute bars from the courts an otherwise justiciable issue, * * *. Here there is no forum, other than the ordinary courts, to hear this complaint. When, as we have previously concluded in this opinion, definite personal rights are created by federal statute, similar in kind to those customarily treated in courts of law, the silence of Congress as to judicial review is, at any rate in the absence of an administrative remedy, not to be construed as a denial of authority to the aggrieved person to seek appropriate relief in the federal courts in the exercise of their general jurisdiction." 321 U. S. at 309.

Congress clearly adopted this view in enacting the Administrative Procedure Act, 5 U. S. C. § 1001 *et seq.* Section 10(c) provides that, except where statutes preclude judicial review or agency discretion is involved, "every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review." A Congressional intent to withhold judicial review of

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manner other than that set forth in subsection (f) of this section." (Emphasis supplied.)

This provision also, by its terms, relates only to matters determined pursuant to subsection (c), which relates wholly to review at the instance of employees and is concededly inapplicable to petitioner.

agency action must be clearly and convincingly demonstrated. As the House Judiciary Committee put it:

> "Very rarely do statutes withhold judicial review. It has never been the policy of Congress to prevent the administration of its own statutes from being judicially confined to the scope of authority granted or to the objectives specified. Its policy could not be otherwise, for in such a case statutes would in effect be blank checks drawn to the credit of some administrative officer or board. The statutes of Congress are not merely advisory when they relate to administrative agencies, any more than in other cases. To preclude judicial review under this bill a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it. The mere failure to provide specially by statute for judicial review is certainly no evidence of intent to withhold review." H. R. Rep. No. 1980, 79th Cong. 2d Sess., p. 41 (1946).

To hold in this case, as did the Court of Appeals, that the provisions of the Railroad Unemployment Insurance Act granting review to employees preclude judicial review of the Board's action at the instance of employers is to hold that all the statutory commands with respect to disqualification of employees were intended by Congress to be merely advisory and that Congress intended to give the Board a blank check for the disbursement of funds to employees. For, if petitioner is denied the right to challenge the action of the Board, there is no check whatever upon the Board's prodigality in disbursing funds contributed by petitioner and other carriers under the Act. If the Court of Appeals is correct, Congress intended that the Board should have authority to disregard the disqualification provisions of the Act as it saw fit, even to the extent, for example, of paying compensation to employees who were not unemployed. Clearly, Congress did not in-

tend to delegate such broad legislative and judicial powers to the Board. Nothing in the statute or its legislative history indicates that decisions awarding benefits which were beyond the authority of the Board to make—at least those decisions which, in the light of the disqualification provisions, are arbitrary and without support in law or fact—were to be unreviewable in the courts. Indeed, this Court has rejected the contention that a final administrative order is "not reviewable by any court even though entered arbitrarily, without substantial supporting evidence, and in defiance of law" as "out of harmony with the general legislative pattern of administrative and judicial relationships." *United States* v. *Interstate Commerce Commission,* 337 U. S. 426, 433-4 (1949). See *Parker* v. *Fleming,* 329 U. S. 531, 537 (1947). In the instant case, as in *Fleming* v. *Moberly Milk Products Co.,* 160 F. 2d 259, 265 (C. A. D. C. 1947),

> "If the judiciary has no power in such matter, the only practical restraint would be the self-restraint of the executive branch. Such a result is foreign to our concept of the division of the powers of government."

The Court of Appeals failed to give adequate—if, indeed, it gave any—consideration to the principles enunciated by this Court and by Congress governing the question of reviewability of agency action. The decision in this case stands as a precedent against any future action by an employer seeking to restrain the payment of unemployment benefits under the Railroad Unemployment Insurance Act on grounds other than coverage, no matter how arbitrary and capricious the Board's action and no matter how immediate and drastic the effect upon the carrier.

The questions presented by this petition involve not only the rights of this petitioner but of every carrier subject to these statutes; they involve not only this particular

dispute but every future case in which carrier employees strike prior to the appointment of an Emergency Board under the Railway Labor Act; they involve not only this payment out of the Railroad Unemployment Insurance Account but the right of any person at any time to invoke the equity powers of the courts to prevent the illegal depletion of the trust fund. The issues are narrowly defined but broadly significant. The proper administration of the Railroad Unemployment Insurance Act and the resolution of conflicting interpretations of the Railway Labor Act depend upon this Court's action upon this petition.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

KENNETH F. BURGESS,
DOUGLAS F. SMITH,
HOWARD P. ROBINSON,
JOHN R. TAYLOR,
Counsel for Petitioner.

SIDLEY, AUSTIN, BURGESS & SMITH,
11 S. La Salle Street,
Chicago 3, Illinois,
Of Counsel.

Dated August 1, 1951.

APPENDIX A.

Railway Labor Act.

(45 U. S. C. § 151 *et seq.*)

* * * * *

§ 152. General duties—Duty of carriers and employees to settle disputes.

First. It shall be the duty of all carriers, their officers, agents and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Consideration of disputes by representatives.

Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

* * * * *

§ 155. Functions of Mediation Board—Disputes within jurisdiction of Mediation Board.

First. The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

Railroad Unemployment Insurance Act.

(45 U. S. C. § 351 *et seq.*)

* * * * *

§ 354. Disqualifying conditions—Day of unemployment or day of sickness.

* * * * *

Day of unemployment.

(a-2) There shall not be considered as a day of unemployment, with respect to any employee—

* * * * *

(iii) subject to the provisions of subsection (b) of this section, any day with respect to which the Board finds that his unemployment was due to a stoppage of work because of a strike in the establishment, premises, or enterprises at which he was last employed, and the Board finds that such strike was commenced in violation of the provisions of chapter 8 of this title or in violation of the established rules and practices of a bona fide labor organization of which he was a member;

* * * * *

§ 355. Claims for benefits.

* * * * *

Hearing and review of decisions on claims.

(c) Each qualified employee whose claim for benefits has been denied in whole or in part upon an initial determination with respect thereto upon a basis other than one which is reviewable pursuant to one of the succeeding paragraphs of this subsection, shall be granted an opportunity for a fair hearing thereon before a referee or such other reviewing body as the Board may establish or assign thereto.

Any claimant whose claim for benefits has been denied in an initial determination with respect thereto upon the

basis of his not being a qualified employee, and any claimant who contends that under an initial determination of his claim he has been awarded benefits at less than the proper rate, may appeal to the Board for the review of such determination. Thereupon the Board shall review the determination and for such review may designate one of its officers or employees to receive evidence and to report to the Board thereon together with recommendations. In any such case the Board or the person so designated shall, by publication or otherwise, notify all parties properly interested of their right to participate in the proceeding and, if a hearing is to be held, of the time and place of the hearing. At the request of any party properly interested the Board shall provide for a hearing, and may provide for a hearing on its own motion. The Board shall prescribe regulations governing the appeals provided for in this paragraph and for decisions upon such appeal.

In any case in which benefits are awarded to a claimant in whole or in part upon the basis of pay earned in the service of a person or company found by the Board to be an employer as defined in this chapter but which denies that it is such an employer, such benefits awarded on such basis shall be paid to such claimant subject to a right of recovery of such benefits. The Board shall thereupon designate one of its officers or employees to receive evidence and to report to the Board on whether such benefits should be repaid. The Board may also designate one of its officers or employees to receive evidence and report to the Board whether or not any person or company is entitled to a refund of contributions or should be required to pay contributions under this chapter, regardless of whether or not any claims for benefits will have been filed upon the basis of service in the employ of such person or company, and shall follow such procedure if contributions are assessed and payment is refused or payment is made and a refund claimed upon the basis that such person or company is or will not have been liable for such contributions. In any such case the Board or the person so designated shall, by publication or otherwise, notify all parties properly interested of their right to participate in the proceeding and, if a hearing is to be held, of the time and place of the hear-

ing. At the request of any party properly interested the Board shall provide for a hearing, and may provide for a hearing on its own motion. The Board shall prescribe regulations governing the proceedings provided for in this paragraph and for decisions upon such proceedings.

Final decisions of the Board in the cases provided for in the preceding two paragraphs shall be communicated to the claimant and to the other interested parties within fifteen days after it is made. Any properly interested party notified, as hereinabove provided, of his right to participate in the proceedings may obtain a review of any such decision by which he claims to be aggrieved or the determination of any issue therein in the manner provided in subsection (f) of this section with respect to the review of the Board's decisions upon claims for benefits and subject to all provisions of law applicable to the review of such decisions. Subject only to such review, the decision of the Board upon all issues determined in such decision shall be final and conclusive for all purposes and shall conclusively establish all rights and obligations, arising under this chapter, of every party notified as hereinabove provided of his right to participate in the proceedings.

Any issue determinable pursuant to this subsection and subsection (f) of this section shall not be determined in any manner other than pursuant to this subsection and subsection (f) of this section.

Decisions of reviewing bodies; review and finality.

(d) The Board shall prescribe regulations governing the filing of cases with and the decisions of cases by reviewing bodies, and the review of such decisions. The Board may provide for intermediate reviews of such decisions by such bodies as the Board may establish or assign thereto. The Board may (i) on its own motion review a decision of an intermediate reviewing body on the basis of the evidence previously submitted in such case, and may direct the taking of additional evidence, or (ii) permit such parties as it finds properly interested in the proceedings to take appeals to the Board. Unless a review or an appeal is had pursuant to this subsection, the decision of

an intermediate reviewing body shall, subject to such regulations as the Board may prescribe, be deemed to be the final decision of the Board.

Application of rules of evidence in law and equity; notice of findings.

(e) In any proceeding other than a court proceeding, the rules of evidence prevailing in courts of law or equity shall not be controlling, but a full and complete record shall be kept of all proceedings and testimony, and the Board's final determination, together with its findings of fact and conclusions of law in connection therewith, shall be communicated to the parties within fifteen days after the date of such final determination.

Review of final decision of Board by Circuit Courts of Appeals; costs.

(f) Any claimant, or any railway labor organization organized in accordance with the provisions of chapter 8 of this title, of which claimant is a member, or any other party aggrieved by a final decision under subsection (c) of this section, may, only after all administrative remedies within the Board will have been availed of and exhausted, obtain a review of any final decision of the Board by filing a petition for review within ninety days after the mailing of notice of such decision to the claimant or other party, or within such further time as the Board may allow, in the United States circuit court of appeals for the circuit in which the claimant or other party resides or will have had his principal place of business or principal executive office, or in the United States Circuit Court of Appeals for the Seventh Circuit or in the Court of Appeals for the District of Columbia. A copy of such petition, together with initial process, shall forthwith be served upon the Board or any officer designated by it for such purpose. Service may be made upon the Board by registered mail addressed to the Chairman. Within fifteen days after receipt of service, or within such additional time as the court may allow, the Board shall certify and file with the court in which such petition has been filed a transcript of the record upon which the findings and decision complained of are based. Upon

such filing the court shall have exclusive jurisdiction of the proceeding and of the question determined therein, and shall give precedence in the adjudication thereof over all other civil cases not otherwise entitled by law to precedence. It shall have power to enter upon the pleadings and transcript of the record a degree affirming, modifying or reversing the decision of the Board, with or without remanding the cause for rehearing. The findings of the Board as to the facts, if supported by evidence and in the absence of fraud, shall be conclusive. No additional evidence shall be received by the court, but the court may order additional evidence to be taken before the Board, and the Board may, after hearing such additional evidence, modify its findings of fact and conclusions and file such additional or modified findings and conclusions with the court, and the Board shall file with the court a transcript of the additional record. The judgment and decree of the court shall be final, subject to review as in equity cases.

An applicant for review of a final decision of the Board concerning a claim for benefits shall not be liable for costs, including costs of service, or costs of printing records, except that costs may be assessed by the court against such applicant if the court determines that the proceedings for such review have been instituted or continued without reasonable ground.

Finality of Board decisions.

(g) Findings of fact and conclusions of law of the Board in the determination of any claim for benefits or refund, the determination of any other matter pursuant to subsection (c) of this section, and the determination of the Board that the unexpended funds in the account are available for the payment of any claim for benefits or refund under this chapter, shall be, except as provided in subsection (f) of this section, binding and conclusive for all purposes and upon all persons, including the Comptroller General and any other administrative or account-

ing officer, employee, or agent of the United States, and shall not be subject to review in any manner other than that set forth in subsection (f) of this Section.

* * * * *

§ 358. Contributions—Employers' contributions.

(a) Every employer shall pay a contribution, with respect to having employees in his service, equal to the percentage determined as set forth below of so much of the compensation as is not in excess of $300 for any calendar month paid by him to any employee for services rendered to him after June 30, 1939; Provided, however, That if compensation is paid to an employee by more than one employer with respect to any such calendar month, the contributions required by this subsection shall apply to not more than $300 of the aggregate compensation paid to said employee by all said employers with respect to such calendar month, and each employer other than a subordinate unit of a national railway-labor-organization employer shall be liable for that proportion of the contribution with respect to such compensation paid by all such employers which the compensation paid by him after December 31, 1947, to the employee for services during any calendar month after 1946 bears to the total compensation paid by all such employers after December 31, 1946, to such employee for services rendered during such month; and in the event that the compensation so paid by such employers to the employee for services rendered during such month is less than $300, each subordinate unit of a national railway-labor-organization employer shall be liable for such proportion of any additional contribution as the compensation paid by such employer after December 31, 1946, to such employee for services rendered during such month bears to the total compensation paid by all such employers after December 31, 1946, to such employee for services rendered during such month:

1. With respect to compensation paid prior to January 1, 1948, the rate shall be 3 per centum;

2. With respect to compensation paid after December 31, 1947, the rate shall be as follows:

If the balance to the credit of the railroad unemployment insurance account as of the close of business on September 30 of any year, as determined by the Board is:	The rate with respect to compensation paid during the next succeeding calendar year shall be:
$450,000,000 or more	½ percent.
$400,000,000 or more but less than $450,000,000	1 percent.
$350,000,000 or more but less than $400,000,000	1½ percent.
$300,000,000 or more but less than $350,000,000	2 percent.
$250,000,000 or more but less than $300,000,000	2½ percent.
Less than $250,000,000	3 percent.

As soon as practicable following June 23, 1948, the Board shall determine and proclaim the balance to the credit of the account as of the close of business on September 30, 1947, and on or before December 31, of 1948 and of each succeeding year, the Board shall determine and proclaim the balance to the credit of the account as of the close of business on September 30 of such year.

* * * * *

(f) The contributions required by this chapter shall be collected by the Board and shall be deposited by it with the Secretary of the Treasury of the United States, such part thereof as equals 0.2 per centum of the total compensation on which such contributions are based to be deposited to the credit of the fund and the balance to be deposited to the credit of the account.

* * * * *

§ 360. Railroad unemployment insurance account—Funds constituting account; availability for benefits or refunds.

(a) The Secretary of the Treasury shall maintain in the unemployment trust fund established pursuant to section 1104 of Title 42 an account to be known as the railroad unemployment insurance account. This account shall consist of (i) such part of all contributions collected pursuant to section 358 of this title as is in excess of 0.2 per

centum of the total compensation on which such contributions are based, together with all interest collected pursuant to section 358 (g) of this title; (ii) all amounts transferred or paid into the account pursuant to section 363 or section 364 of this title; (iii) all additional amounts appropriated to the account in accordance with any provision of this chapter or with any provision of law now or hereafter adopted; (iv) a proportionate part of the earnings of the unemployment trust fund, computed in accordance with the provisions of section 1104(e) of Title 42; (v) all amounts realized in recoveries for overpayments or erroneous payments of benefits; (vi) all amounts transferred thereto pursuant to section 361 of this title; (vii) all fines or penalties collected pursuant to the provisions of this chapter; and (viii) all amounts credited thereto pursuant to section 352(f) or section 362(g) of this title. Notwithstanding any other provision of law, all moneys credited to the account shall be mingled and undivided, and are permanently appropriated to the Board to be continuously available to the Board without further appropriation, for the payment of benefits and refunds under this chapter, and no part thereof shall lapse at any time, or be carried to the surplus fund or any other fund.

* * * * *